HJ FAUZI HJ A MAJID

v.

KENANGAN ERAT SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[EX-PARTE ORIGINATING SUMMONS NO: 24-299-2003 &
ORIGINATING SUMMONS NO: 1-24-379-2004]
24 OCTOBER 2005

LAND LAW: *Sale of land - Power of Attorney - Irrevocability - Valuable consideration - Particulars as to valuable consideration not expressly stated in supporting affidavit - Whether fatal - Powers of Attorney Act 1949 s. 6(1)(a)*

LAND LAW: *Sale of land - Caveat - Form 19B - Power of attorney - Whether disclosing no caveatable interest in land - National Land Code s. 323*

In this case, one Matrose bin Abdullah ('the deceased') is the registered owner of a piece of land in the Mukim of Duyung, Melaka ('the land'). On 8 February 1985, the deceased executed a power of attorney in respect of the land in favour of the applicant ('Hj Fauzi'), purportedly in consideration of a loan of RM35,000 granted him by the latter. On 10 December 2003, *vide* an *ex parte* originating summons ('*ex parte* OS'), Hj Fauzi successfully applied for an order respecting the validity of the power of attorney ('the *ex parte* order'). Thereafter, to protect his interest in the land, Hj Fauzi lodged a caveat against the land on 15 January 2004. The facts showed, however, that, prior to the hearing of the *ex parte* OS, on 2 October 2003, Kenangan Erat Sdn Bhd ('Kenangan Erat') became the registered proprietor of the land for valuable consideration. It was also evident that a charge had hitherto been created over the land in favour of Bank Bumiputra Malaysia Bhd ('the bank'), and that Kenangan Erat had discharged the same and redeemed the title by settling the outstanding loan to the bank. Upon the obtaining facts and circumstances, Kenangan Erat applied and was allowed to intervene in the *ex parte* OS. Kenangan Erat then applied to set aside the *ex parte* order, and further, to remove the caveat lodged by Hj Fauzi. Before the learned judge, Kenangan Erat argued that the *ex parte* order ought to be set aside as it was tainted with material non-disclosure and misrepresentation. It was further contended that the caveat ought to be removed, as Hj Fauzi had no caveatable interest in the land and could not in law sustain the caveat.

Held (setting aside *ex parte* order and removing the caveat):

[1] Upon a proper construction of s. 6(1)(a) of the Powers of Attorney Act 1949, valuable consideration is an essential element in order to sustain the irrevocability of a power of attorney and that this valuable consideration must be expressly stated in specific particulars either in the power of attorney itself or the affidavit in support for the purposes of the *ex parte* OS. This had not been fulfilled by Hj Fauzi. As it were, Hj Fauzi's averment that he had lent RM35,000 to the deceased did not condescend to particulars. (p. 235 a-d)

[2] More importantly, on 10 December 2003, an assurance was given by Hj Fauzi to the court that there were no encumbrances to the land. This however was not true, as the land had in reality been charged to the bank and upon its discharge had been registered in the name of Kenangan Erat with effect from 2 October 2003. This fact about the charge, the discharge and subsequent transfer of the land to Kenangan Erat was not disclosed in any of Hj Fauzi's affidavits. These were material non-disclosures or misrepresentation with the result that the *ex parte* order ought to be set aside. (p. 235 f)

[3] As showed by Form 19B, the power of attorney constituted the sole ground given in support of the entry of caveat. A conjunctive reading of Form 19B, the statutory declaration and the power of attorney however did not appear to disclose a caveatable interest under s. 323 of the National Land Code. Further, no allegation whatsoever was made against Kenangan Erat, the registered proprietor with effect from 2 October 2003. The caveat was therefore liable to be removed. (p. 237 d-e)

[Ex parte order set aside. Validity of power of attorney to be determined at full trial. Ex parte originating summons converted to writ pursuant to O. 28 r. 8 Rules of High court 1980. Caveat to be removed].

Case(s) referred to:

Arunasalam Chettiar Karuppan Chettiar v. Goh Yew Jing & Ors [1999] 6 MLJ 202 ***(refd)***

Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 PC ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 MLJ 263 ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 1 MLJ 719 CA ***(refd)***

Mok Yong Kong & Anor v Mok Yong Chuan [2002] 2 MLJ 718 CA ***(refd)***

Ting Ling Kiew & Anor v. Tan Eng Iron Works Co Ltd [1992] 2 MLJ 217 ***(refd)***

Legislation referred to:
National Land Code 1965, s. 323(1)(a)
Powers of Attorney Act 1949, s. 6(1)(a)
Rules of the High Court 1980, O. 15 r. 6(2)(b)

For the applicant - Rabindran Devadason; M/s Devadason & Devadason,
For the respondent - Trevor George De Silva; M/s CW Chia & Co

Reported by Rose Aziz

JUDGMENT

Low Hop Bing J:

Consolidation

The two matters before me *viz ex parte* originating summons No. 24-299-2003 ("the *ex parte* originating summons") and originating summons No. 24-379-2004 ("the originating summons") have been consolidated pursuant to my order dated 9 December 2004.

The parties are plaintiff and defendant in one matter and also defendant and plaintiff in the other matter. Hence, for brevity and convenience, I shall refer to them by their respective names as cited in the titles.

Vide summons in chambers in encl. (10), Kenangan Erat Sdn Bhd ("Kenangan Erat") sought leave to intervene and be made a party in the *ex parte* originating summons under O. 15 r. 6(2)(b) of the Rules of the High Court 1980; and also to set aside the *ex parte* order dated 10 December 2003 ("the *ex parte* order").

All references to an order and a rule hereinafter are references to an order and a rule in the Rules of the High Court 1980 unless otherwise stated.

On 9 December 2004, by consent, Kenangan Erat was granted leave to intervene and be added as a party ie, as defendant in the *ex parte* originating summons.

In the second matter ie, the originating summons, Kenangan Erat is the plaintiff seeking an order to remove the caveat entered by the defendant Haji Fauzi bin Hj. A. Majid ("Haji Fauzi") on the land known as Lot 877 held under Geran Mukim MCL 541, in the mukim of Duyong, district of Melaka Tengah with an area of 1.1508 hectares ('the land"), damages and costs.

Factual Background

Kenangan Erat is the current registered owner of the land with effect from 2 October 2003 for valuable consideration and as a result of transfers of interest from all the beneficiaries of the former registered owner, one Matrose bin Abdullah, who passed away on 25 July 1988 ("the deceased"). The transfer was effected pursuant to a sale and purchase agreement dated 21 November 2002 ("the SPA").

The beneficiaries of the deceased are:

Name	Share in the land
Son Abu Samah	2/11
Daughter Menah	1/11
Son Mudah	2/11
Son Sa'hamin	2/11
Son Selamat	2/11
Grandson Razali bin Mohd	2/11

On 11 March 2003, the land administrator in Melaka Tengah granted letters of administration to the deceased's son Mudah, and the distribution of the deceased's estate was effected in the shares set out above.

One of the vendors in the SPA was stated as Mohd Bin Idrus who was not one of the beneficiaries. However, this Mohd is apparently the father of the beneficiary Razali bin Mohd, who in turn is the grandson of the deceased.

A registered charge had been created over the land by the then Bank Bumiputra Malaysia Bhd ("the bank"). Kenangan Erat has redeemed the title by settling the outstanding loan of RM39,500 on or about 21 May 2003, thereby discharging the charge.

On 27 August 2004, the proposed intervener conducted a land search on the land and discovered that Haji Fauzi had on 15 January 2004 entered a private caveat over the land ("the caveat") pursuant to an alleged power of attorney purportedly given by the deceased on 8 February 1985.

Upon Haji Fauzi's *ex parte* application, I have on 10 December 2003 made the *ex parte* order declaring the power of attorney valid on the basis of Haji Fauzi's affidavit alleging, *inter alia*, that the deceased had granted him an irrevocable power of attorney in consideration of the loan of RM35,000 given by Hj. Fauzi to the deceased during his life time.

Agreed Issues For Determination

The parties have agreed that the issues for determination are:

1. Whether the *ex parte* order ought to be set aside ("Issue 1")?

2. Whether the caveat ought to be removed ("Issue 2")?

Issue 1: *Ex Parte* Order

It was submitted by learned counsel Mr. Rabindran Devadason for Haji Fauzi that the deceased had for valuable consideration granted an irrevocable poewer of attorney to Haji Fauzi on 8 February 1985 which was registered in this court on 13 February 1985. The power of attorney was stated to be binding on the personal representatives, heirs and successors of the deceased. He added that I had granted the *ex parte* order declaring that the power of attorney is valid.

For Kenangan Erat, learned counsel Mr. Trevor George De Silva and Mr. Chia Cheng Wee contended that the *ex parte* order should be set aside on ground of material non-disclosure and misrepresentation in relation to the title of the land which had been registered in the name of Kenangan Erat and that the issue of validity of the power of attorney should be decided on an *inter partes* basis.

In my view, the answer to Issue 1 is to be ascertained by reference to Haji Fauzi's affidavit in support. Para. 5 thereof stated that the land described in the power of attorney was currently charged to the Bank from which he wanted to redeem and that there were no other encumbrances. Para 6 stated that at various times the deceased had borrowed more than RM35,000 in cash, which was allegedly witnessed by the attesting solicitor and his staff.

It is imperative that I put in proper perspective the chronology of events leading to the grant of the *ex parte* order.

The *ex parte* originating summons was filed on 16 July 2003 and fixed for hearing on 11 September 2003, when I requested Haji Fauzi's learned counsel to do more research. I then adjourned the hearing to 13 November 2003, when it turned out that the papers were not in order and so the hearing was re-fixed for 10 December 2003 so as to enable Haji Fauzi to file further affidavits.

Haji Fauzi's learned counsel assured me on 10 December 2003 that the papers were in order and prayed for the *ex parte* order which I granted on that assurance.

Upon a proper perusal of all the affidavits and documentary exhibits filed herein, it is my specific finding that Haji Fauzi's averment that he had lent some RM35,000 to the deceased did not condescend upon particulars.

Powers of attorney given for valuable consideration are governed by s. 6(1)(a) of the Power of Attorney Act 1949, in the following words:

> Powers of attorney given for valuable consideration
>
> 6. (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser:
>
> (a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power;

Upon a proper construction of s. 6(1)(a), I am of the view that valuable consideration is an essential element in order to sustain the irrevocability of a power of attorney and that this valuable consideration must be expressly stated in specific particulars either in the power of attorney itself or the affidavit in support for the purposes of the *ex parte* originating summons. However, this had not been fulfilled by Haji Fauzi.

Further, a more crucial fact is that on 10 December 2003, learned counsel had assured me that the papers were in order and that there were no encumbrances. However, the true position is that the land had been charged to the bank and that upon discharge of charge it was registered in the name of Kenangan Erat with effect from 2 October 2003. This fact in relation to the charge, the discharge and subsequent registration of the transfer of the land in the name of Kenangan Erat should have been but was not disclosed in any of Haji Fauzi's affidavits. In my view, this constitutes a material non-disclosure or misrepresentation which is not consistent with the *doctrine* of *uberrimae fidei* ("of the utmost good faith") which is so fundamental and essential to the sustenance of the *ex parte* order made pursuant to the *ex parte* originating summons.

In the circumstances, I hold that the *ex parte* order ought to be set aside.

Issue 2: Removal Of Caveat

It was submitted for Haji Fauzi, *inter alia,* that Haji Fauzi has a registrable interest because the power of attorney was given for valuable consideration and so is valid, irrevocable and binding on the deceased's personal representatives etc.

The points raised for Kenangan Erat are, *inter alia*, that:

1. Hj. Fauzi's Form 19B and statutory declaration has made no allegation against Kenangan Erat and so the caveat is frivolous and vexatious, referring to *Mok Yong Kong & Anor v. Mok Yong Chuan* [2002] 2 MLJ 718 CA; and

2. Haji Fauzi has no caveatable interest, relying on *inter alia*, *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719 CA.

I would first set out the statutory provisions governing the entry of private caveats contained in s. 323(1)(a) of the National Land Code 1965, which, where relevant, reads as follows:

> 323 Applications for entry of private caveats
>
> (1) The persons ... at whose instance a private caveat may be entered are:
>
> (a) any person ... claiming title to, or any registrable interest in, any alienated land or undivided share in **any alienated land or any right to such title or interest**;
>
> [emphasis added]

In my view, the right to title or interest must be a registrable title or interest.

For the purpose of determining whether Hj. Fauzi has a registrable or caveatable interest against Kenangan Erat's land, it is enlightening to refer to the judgment of the Court of Appeal in *Luggage Distributor (M) Sdn. Bhd, supra*, where at pp. 741-743, Gopal Sri Ram JCA unfolded that the function of a judge in hearing such an application involves three stages of the inquiry *viz:*

1. Examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further;

2. The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial; and

3. After the above two hurdles have been crossed by the caveator, the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 PC as "the balance of convenience".

Gopal Sri Ram JCA added that it is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain (see also *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 MLJ 782 CA; *and Goh Paik Swan v. Ng Choo Lum* [1996] 3 MLJ 437 CA).

By way of embarking on the first stage of the inquiry, I shall proceed to examine the ground expressed in Haji Fauzi's application for entry of the caveat in Form 19B in order to determine whether it is sufficient in law to support the caveat.

In Hj. Fauzi's Form 19B and statutory declaration, both dated 15 January 2004, for the application for entry of the caveat, the sole ground in support thereof is the power of attorney. A careful conjunctive reading of the ground contained in these documents *viz* Form 19B, statutory declaration and power of attorney ("the three documents") does not appear to disclose a caveatable interest under s. 323(1)(a) in order to support the caveat.

Further, in the three documents, no allegation whatsoever was made against Kenangan Erat, the registered proprietor with effect from 2 October 2003.

In *Mok Yong Kong, supra*, the Court of Appeal in the judgment delivered by Gopal Sri Ram JCA held, *inter alia*, that where no allegation was made against the registered proprietor at the material time the caveat was lodged, the caveat was liable to be removed on this ground alone, as being frivolous and vexatious, as a caveator must be held to the grounds he alleged in his application in Form 19B when lodging his caveat (pp. 721H to 722A).

In *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 at p. 270 Jemuri Serjan CJ (Borneo) (as he then was) speaking for the then Supreme Court said that a claim to a caveatable interest and the right to lodge a caveat "must be minutely inquired into in order to decide whether the caveat should remain on the register document of title or be removed."

Haji Fauzi has not filed any suit in order to enforce his alleged caveatable interest, if at all he strongly believes that he has the right to enforce the caveatable interest pursuant to the power of attorney in relation to the land.

Even by stretching one's imagination further to assume that Hj. Fauzi had filed a suit to enforce his alleged caveatable interest eg, by seeking a decree of specific performance, that does not *ipso facto* mean that the caveat is not to be removed, as there is no special provision in law that automatically permits a caveat to remain pending the disposal of the main suit. (per Zulkefli J (now JCA) in NKR *Arunasalam Chettiar a/l Karuppan Chettiar v. Goh Yew Jing & Ors* [1999] 6 MLJ 202, at p. 209G).

The above grounds are in my view adequate for the purpose of disposing of Issue 2.

Other Points

Other points had been raised by the respective learned counsel including Kenangan Erat's indefeasible title but I do not consider those points as having the slightest relevance to these proceedings. However, I express my gratitude to them for their efforts.

Conclusion

I hereby set aside the *ex parte* order with costs and hold that the validity of the power of attorney must be determined at a full trial, in which serious disputes of facts pertaining to the consideration for the power of attorney are to be resolved. For this purpose, I order that the *ex parte* originating summons be converted to a writ under O. 28 r. 8(1) in line with the Supreme Court judgment in *Ting Ling Kiew & Anor v. Tan Eng Iron Works Co Ltd* [1992] 2 MLJ 217.

I also order that the caveat be removed with costs, and damages, if any, to be assessed by the learned registrar of this court.